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IN THE

Supreme Court of the United States

October Term, 1946.

No. 291

MARION KOTCH, ET AL.,

Appellants,

versus

BOARD OF RIVER PORT PILOT COMMISSIONERS FOR THE PORT OF NEW ORLEANS, ET AL.,

Appellees.

BRIEF IN SUPPORT OF THE APPELLANTS' PETITION FOR A REHEARING.

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ARGUMENT.

Your Honors concede that Act 54 of 1908 gives the pilot board and the commissioned pilots themselves absolute control of appointment, through the provision requiring service as an apprentice under a commissioned pilot.

The majority opinion holds that the act is constitutional, nevertheless.

It is held by the majority members of the court that a discriminatory law in respect to pilotage on the Mississippi River is desirable for the good of commerce and shipping. We fail to see how the court could reach any conclusion on that score;—for there is no evidence in the record one way or the other. The case was tried out on an exception of no cause of action filed by the defendants. The defendants might have tendered such issue, in an answer regularly filed. The plaintiffs then would have had an opportunity to present their side. But the defendants elected to try the case out on an exception of no cause of action. The case has been decided against the plaintiffs on a factual issue which they had no opportunity to meet. The record contains no facts other than those alleged in the plaintiffs' petition. By the rules of practice of Louisiana, all well-pleaded allegations of fact are admitted in considering an exception of no cause of action. *Gerald v. Standard Oil Company*, 204 La. 690, 16 So. 2d 233.

Since the adoption of the Fourteenth Amendment it has been the law of the land that persons similarly situated are entitled to equal opportunity in the pursuit of a lawful calling or profession. The majority opinion in this case narrows the equal protection guaranty. The opinion holds that to render a state law unconstitutional it is not enough that the act discriminate among persons similarly situated, —that the discrimination, to render the act invalid, must be based upon hostility to a "particular race, religion, beliefs, or * * * other reason having no relation to the regulated activities."

The majority ruling is contrary to the settled jurisprudence of the land. The court here has departed from the principle that persons similarly situated are entitled to equal opportunity. Opportunity, equal opportunity, is the very essence of the Fourteenth Amendment. The majority opinion holds that a state may discriminate where it deems it expedient to do so.

The general rule on the subject is stated in *Corpus Juris Secundum*, Volume 6, Section 496, thus:

> "Classification of businesses, occupations, and callings may be made according to natural, reasonable and well-recognized lines of distinction, and the mere fact that a statute or ordinance applies only to a particular position or profession, or to a particular trade, occupation, or business, or discriminates between persons in different classes of occupations or lines of business, does not render it unconstitutional as class legislation, and such statutes are valid whenever the partial application or discrimination is based on real and reasonable distinctions existing in the subject matter, and affects alike all persons of the same class or pursuing the same business under the same conditions, but *statutes are void* as class legislation wherever they are restricted in their application to certain professions, trades, occupations, or businesses without any reasonable basis for such partial application or discrimination, or *whenever persons engaged in the same business are subject to different restrictions or are given different privileges under the same conditions.*" (Italics ours.)

In *Hayes v. Missouri*, 120 U. S. 68, 7 S. Ct. 350, this court said:

> "The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in Barbier v. Connolly, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, *if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.*' 113 U. S. 27, 32 (28:923, 925)." (Italics ours.)

In *Dent v. State of West Virginia*, 127 U. S. 114, 32 L. Ed. 623, 9 S. Ct. 231, this court said:

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to everyone on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors,

and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people authorize it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend primarily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation."

In *Minneapolis and St. Louis R. Co. v. Beckwith*, 129 U. S. 26, 32 L. Ed. 585, 9 S. Ct. 207, this court said:

"We will consider the objections of the railway company in the reverse order in which they are

stated by counsel. And first, as to the alleged conflict of the Law of Iowa with the clause of the Fourteenth Amendment ordaining that no State shall deny to any person within its jurisdiction the equal protection of the laws. *That clause does undoubtedly prohibit discriminating and partial legislation by any State in favor of particular persons as against others in like condition.* Equality of protection implies not merely accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind."

The general rule on the subject is stated in *American Jurisprudence*, Volume 11, Section 336, thus:

"The right to earn a livelihood by following the ordinary occupations of life is protected by the Constitution; such protection is particularly found in the guaranties of the Fourteenth Amendment. It has been said that the preservation of such right is the principal purpose of the Constitution itself and is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure. The right is fundamental, natural, inherent and inalienable, and is one of the most sacred and most valuable rights of a citizen. A person's business, occupation, or calling is 'property' within the meaning of the constitutional provisions as to due process of law and is also included in the right to liberty and the pursuit of happiness.

"The right of a person to pursue a calling, consistent with proper and reasonable police regulation which the particular situation may sanction, cannot be taken away by legislative enactment. The com-

mon businesses and callings of life, the ordinary trades and pursuits, which are innocent in themselves and which have been followed in all communities from time immemorial, upon the same terms. *Any person is at liberty to pursue any lawful calling, under such restrictions as are imposed upon all persons of the same age, sex, and condition.* It is not competent, generally speaking, to forbid any person or class of persons whether citizens or resident aliens, to offer their services in lawful business or to subject others to penalties for employing them. Moreover, it has been held that the right to choose one's occupation includes the right to be free from unlawful interference or control in the conduct of it.

"The granting of monopolies or exclusive privileges to corporations or persons is an invasion of the rights of others to follow a lawful calling and an infringement of personal liberty, but the Fourteenth Amendment does not protect a business against the hazards of competition." (Italics ours.)

The majority opinion in this case states:

"It is within the framework of this long-standing pilotage regulation system that the practice has apparently existed of permitting pilots, if they choose, to select their relatives and friends as the only ones ultimately eligible for appointment as pilots by the governor. Many other states have established pilotage systems which make the selection of pilots on this basis possible."

But the laws of most states allow equal opportunity to pilots for license.

The pilot law of the State of Washington is explained in *State vs. Board of Pilotage Commissioners*, 198 Wash.

695, 90 P. 2d 238. It is contended by the pilot board in that case that the Washington law gives the board absolute control of appointments. The court held otherwise—and the court declared that had the law attempted to do so it would be unconstitutional, stating:

> "Appellants contend that, if a fair and reasonable construction is given to the act, it would violate no constitutional provision, but that it would violate both article 1, S. 12, of the state constitution, and the fourteenth amendment of the Constitution of the United States, U. S. C. A., if construed as contended for by respondents, to the effect that the board is therein given authority to issue a license to any applicant they may believe to be qualified, regardless of whether or not he has taken an examination, or has the qualifications prescribed by the statute, and that it gives the board the right to limit the number of licenses issued.
>
> "*We agree with appellants that the act would be unconstitutional if given the construction contended for by respondents, in that it would leave to the board the right to determine to whom licenses should be issued upon a personal basis, at the will and pleasure of the board and not upon any basis prescribed by the legislature. It would vest in the board arbitrary power to license one applicant and refuse to license another, although qualified in every respect.* Seattle v. Gibson, 96 Wash. 425, 165 P. 109; State ex rel. Markris v. Superior Court, 113 Wash. 296, 193 P. 845, 12 A. L. R. 1428; Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220; People of State of New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 26 S. Ct. 144, 50 L. Ed. 305. *All of the foregoing cases were rested upon the principle that an ordinance which authorizes*

the issuing or withholding of a license to engage in a lawful business, that is, a business which within itself is perfectly lawful, and commits to any officer or set of officers the power to decide, according to their own notions, in each particular case, the question of the propriety of issuing or withholding a license therefor, and thus deciding who may and who may not engage in such business, is authorizing the exercise of arbitrary power in violation of the fourteenth amendment of the Constitution of the United States. In S. 12, of article 1, of our state constitution, we find the same guaranty, in substance, as follows: 'No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." (Italics ours.)

Petterson v. Board of Commissioners (Tex. Civ. App.) 57 S. W. 1002 and *Olsen vs. Smith* (Tex. Civ. App.) 68 S. W. 320, cited in our original brief, explain the Texas pilot law. The court decided that under the Texas law commissioned pilots do not control appointments, for the provision requiring service as a deputy is merely directory and may be ignored by the governor. In *Petterson v. Board of Commissioners, supra*, the court in no uncertain terms condemned the system of permitting pilots to perpetuate themselves in office and select their successors. In alluding to such system the court used the terms "perversion and abuse". The court said:

"Whether or not the provision, construed in connection with other parts of the law, and which together apparently make the governor's power to appoint dependent on the appointment of deputies by pilots already in service, is constitutional, may be a

graver question. The contention that it enables the pilot to perpetuate himself in office or to select his successor, thus depriving the governor of that discretion with which the law clearly clothes him, is not without force. The mere fact, however, that a law is susceptible of *perversion or abuse*, cannot render it invalid. Nevertheless, if the evil complained of was the inevitable effect of the law, the courts could decline to enforce it. The reasons are apparent. We think the law in its other provisions furnishes an efficient remedy for the threatened or possible wrong. In the first place, if the clause requiring a term of service as branch pilot be directory (and it seems to be so), the governor or board could ignore it in case of abuse, and any person might be appointed whom the board might find upon examination to be possessed of the other required qualifications." (Italics ours.)

The Oregon pilot law, Section 105-219, Oregon Compiled Laws, Volume 7, contains provisions for equal opportunity for license, declaring:

"Qualifications of Pilot: No person shall be licensed as a pilot unless he is an American citizen of the age of 21 years at least, of temperate habits and good moral character; nor unless he possesses the requisite skill and the experience as a navigator and pilot, together with practical knowledge of the currents, tides, soundings and bearings and distances of the several shoals, rocks, bars, points of lands, lights and fog signals of or pertaining to the navigation of the pilot ground for which he applies for a license to act as a pilot, and an applicant for a license over river pilot ground must have at least 1 year continuous experience piloting vessels in the domestic trade prior to making application for a license, and must have

had the necessary experience in handling vessels through the bridges, with and without towboats, under varying conditions."

The New York pilot law, Section 17, Cahill's Consolidated Laws of New York, likewise contains equal provision for license, declaring:

"Every person employed as master, pilot or engineer on board of a steam vessel or a vessel propelled by machinery, carrying passengers or freight for hire, or towing for hire, shall be examined by the inspectors as to his qualifications, and if satisfied therewith they shall grant him a license for the term of 1 year for said boat, boats or class of boats as said inspectors may specify in such license."

The Georgia pilot law, Sections 80-104, 80-105 and 80-106, Georgia Code of 1938, likewise contains equal provision for license, declaring:

"80-104. The commission of pilotage at each of the ports of the State are empowered to license such persons (being citizens of the United States) of good character as they shall think most fit to act as pilots, for the purpose of conducting vessels inward to and outward from the several ports and rivers for which they shall be licensed during their good behavior. The number of licensed pilots shall not exceed 20 for the port of Savannah, 10 for the port of Doboy and Darien, 12 for the port of Brunswick, 2 for the Great Satilla River, and 8 for the port of St. Mary's; and when vacancies shall occur in the number of pilots in any one of the above-named ports or rivers, the commissioners of that port may in their discretion grant licenses to pilots as hereinbefore provided until their number of pilots reaches the number allowed by this

section for that port or river. (Acts 1886, p. 38; 1896, p. 85; 1901, p. 30; 1921, p. 103.)

"80-105. Term of Service of Apprenticeship as Prerequisite to Grant of License. No person shall receive a certificate to act as pilot until he shall have served as apprentice two full years in a decked pilot-boat on the bar for which he seeks to be a pilot (the crew not to be considered as apprentices unless so registered in the office of the commissioners of pilotage), and shall have given satisfactory evidence of character and skill, and any certified pilot shall serve 18 months before he shall be entitled to an increased authority; but, in case of emergency such additional pilot may be appointed as the mayor or other chief officer of the port may determine—the foregoing restrictions of the contrary notwithstanding. (Act 1830, Cobb, 43, Acts 1882-3, p. 70.)

"80-106. Branch Pilots, Appointment of. All branch pilots shall be appointed by the commissioners; and whenever a vacancy shall occur in a branch, the person who shall have served the longest time as an apprentice shall, if deemed competent by the commissioners, be appointed to the vacancy; but no person may hold a branch who is not engaged in the pilotage."

The California pilot law, Sections 1100 and 1101, Deering's California Code, likewise contains equal provision for license, declaring:

"1100. Qualifications of Pilots—A person may not be appointed or licensed as a pilot unless he is an American citizen, over the age of 21 years, and unless he has a practical knowledge of the management of sailing vessels and stream vessels and of the tides,

soundings, bearings, and distances of the several shoals, bars, rocks, points of landings, lighthouses, and fog signals of the ports and harbors for which he is appointed. He shall be of good moral character, and temperate, and he shall possess the skill and ability necessary to discharge the duties of pilot. (Enacted 1937.)

"1101. Licenses; Renewal; Withholding Renewal: Pilots licensed by commissioners shall be carefully examined as to their qualifications, and, if found to be qualified and worthy, they shall receive licenses as pilots for a term of 12 months. Licenses shall be renewed annually unless the commissioners have good cause, or intend for any reason to withhold renewal of a pilot's license, the secretary of the board of commissioners shall serve notice, in writing, on the pilot, specifying the causes, at least 10 days before the expiration of his license. The pilot is thereupon entitled to a full hearing before the board." (Enacted 1937.)

The Connecticut pilot law, Section 3081, Revised General Statutes of Connecticut, likewise contains equal provision for license, declaring:

"The superior court, or any judge thereof in vacation, may, in any county adjoining navigable waters, license as many persons as said court or judge may deem necessary and find qualified, to act as pilots for 3 years in any of the waters of this state. No person shall be so licensed until he shall have given notice of his intention to apply for a license, and of the court and judge to whom, the time when, and the place where such application will be made, by advertising the same at least 6 times in some daily newspaper published in the town where such person

> resides, or if there be none, at least 4 times in some weekly newspaper published in such town or in the nearest adjoining town. Every pilot shall upon the granting of his license, give a bond of $500.00 to the treasurer of such county and his successors in office, with surety, to the acceptance of the court or judge granting such license, conditioned for the faithful performance of his duties as a pilot, upon which bond suit may be brought in the name of any of such treasurer for the benefit of any person who may suffer loss * * *"

It is seen that the majority of states—including New York, California, Oregon, Washington, and Texas, which perhaps have the major part of the country's shipping,—deem discriminating in pilotage unwise. And such system is condemned in the jurisprudence. Note what is said in *Petterson v. Board of Commissioners, supra,* and *State v. Board of Pilotage Commissioners, supra.*

In *Ring v. Patterson,* 170 Or. 234, 1 P. ed. 1105, the plaintiff pilot alleged that the pilot board was controlled by a pilot organization. The court found as a fact that the board was not so controlled. However, the court condemned the practice of a pilot board being controlled by a pilot organization. The court said:

> "Evidently recognizing the above principles of law, the petitioner sought to bring himself within an exception by charging that the commissioners had given themselves over to the control of the Columbia River Pilots' Association, had refused to grant him a license unless he would become a member of that organization, and unless the association favored his application. He relies upon the statement

of the exception contained in 38 C. J., Mandamus, p. 598, S. 74, where the writer states that the writ may issue when the discretion of the quasi-judicial officer has been abused. In the determination of this issue of fact we feel justified in resorting to the presumption that official duty has been regularly performed (section 9-807, Oregon Code 1930), which of necessity includes a disputable presumption that the public officer has reasonably exercised his discretionary power. New York ex rel. Van De Carr, 199 U. S. 552, 26 S. Ct. 144, 50 L. Ed. 305; State v. Briggs, 45 Or. 366, 77 P. 750, 78 P. 361, 2 Ann. Cas. 424. We have carefully read the testimony taken before the referee and have examined all of the exhibits introduced in evidence, but fail to find that a preponderance of the evidence indicates that the commissioners have subjected themselves to the dictates of the Columbia River Pilots' Association. The issue is one of fact only, and since no purpose would be served by an extended statement of our review of the evidence, we content ourselves with a statement of our finding that a preponderance of the evidence fails to substantiate petitioner's charge."

In *Williams v. Molther*, 198 Fed. 460, the court ruled illegal a regulation adopted by federal inspectors requiring certain deck experience of applicants for pilot license. In the course of its opinion the court states that the regulations might in practice create "a dangerous monopoly of the business of pilots and marine engineers." The court said:

"While no citizen has the inherent right to a pilot's license, every citizen has a right to be exam-

ined for it. The local inspectors are to determine the applicant's qualifications. They may hold in any case that he has not had sufficient deck experience. That, however, is quite different from refusing him an examination for this reason. The period of such experience necessary to qualify an applicant would seem in the nature of things to be different in different cases. One applicant might be qualified after one year's experience when another would not be qualified after five years. It seems to us purely arbitrary to say that no one is qualified to act as a pilot because he has not had any fixed period of deck experience. An engineer or an owner who was not in the deck department at all might well by observation and attention have acquired all the qualifications required by the law. The rule imports into the law a condition not to be found in it, and we do not think that it is necessary to carry out the provisions of the title nor even useful or appropriate for that purpose, as it may prevent citizens entirely competent from obtaining a license. *Moreover, as we stated in our previous opinion, 'such or similar restrictions might easily be used to create a dangerous monopoly of the business of pilots and marine engineers.'*" (Italics ours.)

The majority opinion concludes that the exigencies of pilotage demand a discriminatory law,—and that the demand is so great that the principle guaranteeing equal opportunity to persons equally situated must give way. The opinion so concludes though no evidence on the subject has been heard. We earnestly submit that a rehearing should be granted. The plaintiffs have not had their day in court. Given an opportunity to be heard the plaintiffs will show that this pilot law that closes the

door to all except family members and friends of a small clique is unwise. The fact that pilotage is so thoroughly invested with public interest—so important to public safety—is all the more reason why the test for licenses should be skill, not blood relationship. The practice of discrimination in licensing of pilots is condemned in the jurisprudence, and is forbidden by the laws of most states, as well as by the federal pilot law. That fact should carry much weight. Surely it should impel the court to hear the case fully.

The majority opinion calls attention to discriminatory pilot laws of certain states. Pilots have succeeded in passing such laws in some states. Monopolies generate power—power before state assemblies. To date the courts have frowned on such pilot monopolies. By the decision in this case pilot combines are given a green light.

We respectfully submit that a rehearing should be granted in this cause, and that on rehearing, the judgment rendered by this court on March 31, 1947, and the judgment of the district court be reversed.

Respectfully submitted,

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This is to certify that copies of this Brief have been served on opposing counsel on this the .... day of April, 1947.

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